Supreme Court, U.S.
FILED
MAY 23 1997
CLERK

No. 96-1538

In The

Supreme Court of the United States

October Term, 1996

JOHN D. TOLAND and CHRISTAL TOLAND, *as husband and wife and d/b/a the John Toland Company,*

Petitioners,

v.

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF

NEIL CHAMBERLIN
Counsel of Record
DUNCAN & RAINWATER, P.A.
Three Financial Centre, Suite 500
900 South Shackleford
Little Rock, Arkansas 72211-3850
P.O. Box 25938
Little Rock, Arkansas 72221-5938
(501) 228-7600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

SUPPLEMENTAL BRIEF

This supplemental brief is being filed pursuant to Rule 15.8 of the Rules of the Supreme Court of the United States, which says that a party may file a supplemental brief at any time while a petition for writ of certiorari is pending, calling attention to intervening matter not available at the time of the party's last filing.

After the Tolands filed their petition for writ of certiorari on March 28, 1997, both the United States District Court for the Southern District of New York and the United States Court of Appeals for Second Circuit have denied the Tolands' motions for a stay. App. 68-71.[1] The Tolands sought, from those Courts, a stay of the requirement of the Southern District that the Tolands forthwith dismiss with prejudice their arbitration pending against Respondent Prudential Securities Incorporated ("PSI") (App. 44) until such time as their case was resolved by this Court.

(The Tolands presented their petition for writ of certiorari to the Southern District and argued that the petition presented two substantial questions; that good cause existed for the stay because the Tolands should not be required to dismiss their arbitration before exhausting the appellate process; and that the stay would be proper under Rule 62(d) of the Federal Rules of Civil Procedure and Rule 83(b) of the Federal Rules of Civil Procedure,

---

[1] "App." means the Appendix to the Tolands' Petition for Writ of Certiorari and the Supplemental Appendix to this Supplemental Petition, which is numbered consecutively.

which permits a judge to regulate practice in "any manner consistent" with federal law, federal rules, and local rules. The Tolands also presented their petition to the Second Circuit and argued that the petition presented two substantial questions; that good cause existed for the stay because the Tolands should not be required to dismiss their arbitration before exhausting the appellate process; and that the stay was proper under Rule 27(c) of the Second Circuit Local Rules, which permits the Second Circuit to recall a mandate, and under Rule 41(b) of the Federal Rules of Appellate Procedure, which allows for a stay of a mandate.)

On the day that the Tolands' counsel received the Second Circuit's order denying the motion for stay, the Tolands' counsel also received a letter from PSI's counsel in which PSI's counsel asserted that the Tolands' failure to dismiss the arbitration was a "direct act of disobedience" of the Southern District and that, "Any adverse consequences resulting therefrom will have been self inflicted." App. 74. In the past, PSI's counsel had said that it would move before the Southern District for "contempt if warranted" if the Tolands did not dismiss the arbitration. A921-22.[2]

After receiving the above-mentioned order and letter, the Tolands' counsel wrote a letter to the American Arbitration Association dismissing the arbitration. App. 76. Therefore, the ultimate relief which the Tolands now seek

---

[2] "A" means the Appellants' Appendix filed with the Second Circuit Court of Appeals in the appeal below.

has changed to include setting aside the dismissal of the arbitration and reinstating the arbitration.

NEIL CHAMBERLIN
Counsel of Record
DUNCAN & RAINWATER, P.A.
Three Financial Centre, Suite 500
900 South Shackleford
Little Rock, Arkansas 72211-3850
P.O. Box 25938
Little Rock, Arkansas 72221-5938
(501) 228-7600

SUPPLEMENTAL APPENDIX

Page

ORDER OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (APRIL 8, 1997) .....App. 68

ORDER OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT (MAY 6, 1997) .....App. 69

LETTER FROM MATHIAS E. MONE TO NEIL CHAMBERLIN (MAY 9, 1997) .....App. 74

LETTER FROM NEIL CHAMBERLIN TO KIMBERLY L. EMERSON (MAY 13, 1997) .....App. 76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRUDENTIAL SECURITIES INCORPORATED	MDL Docket No. 1005 M-21-67(MP)
LIMITED PARTNERSHIP LITIGATION	ORDER NO. 110
	(Filed April 8, 1997)

An application having been made herein pursuant to Rule 62 [sic] the Federal Rules of Civil Procedure for a Stay of this Court's Order, that the Tolands shall forthwith dismiss their arbitration with Prudential Securities Inc. and other Prudential entities, until such time as this matter is resolved by order of the United States Supreme Court; and Prudential having submitted a Memorandum in opposition to the said Motion and no request having been made to the Court of Appeals for a Stay of its Mandate; and it appearing further that the applicants have failed to show a substantial question for certiorari and having failed to show that there is good cause for a Stay; it is

ORDERED, that the application for a Stay of this Court's requirement that the Tolands forthwith dismiss their arbitration with the Prudential entities until this matter is resolved by order of the United States Supreme Court, be and the same hereby is, in all respects, denied.

Dated: New York, NY
April 8, 1997

/s/ Milton Pollack
Milton Pollack
Senior U. S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

JOHN D. TOLAND and CHRISTAL TOLAND, as husband and wife and d/b/a the John Toland Company, Plaintiffs-Appellants,

v.

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION, Defendant-Appellee

Use short title

95-9209(L)
Docket Number

NOTICE OF MOTION

state type of motion

for Stay

MOTION BY: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

Neil Chamberlin
DUNCAN & RAINWATER
Three Financial Centre, Suite 500
900 South Shackleford
Little Rock, AR 72211-3850 Tele. (501) 228-7600

OPPOSING COUNSEL: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

See attached

Has consent of opposing counsel:

A. been sought?	[X] Yes	[ ] No
B. been obtained?	[ ] Yes	[X] No
Has service been effected?	[X] Yes	[ ] No

Is oral argument desired? [ ] Yes [X] No
(*Substantive motions only*) Nonsubstantive

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:
A. by scheduling order? [X] Yes No
B. by firm date of argument notice? [ ] Yes No
C. If Yes, enter date: Dec. 2, 1996

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [X] Yes [ ] No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion?
[ ] Yes [X] No

If No, explain why not:
This is a post-judgment motion.

Will the parties agree to maintain the status quo until the motion is heard? [X] Yes [ ] No
The Tolands will

Judge or agency whose order is being appealed:

Milton Pollack, United States District Court for the So. Dist. of N.Y.

Brief statement of the relief requested:

Stay of requirement of the court below (Hon. Milton Pollack) that the Tolands dismiss an arbitration with prejudice, until such time as the United States Supreme Court disposes of the Tolands' case. (The Tolands' petition for writ of certiorari is pending.)

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Neil Chamberlin
Signed name must be printed beneath

Neil Chamberlin

Appearing for:
(Name of party)

John D. Toland, et al.

Date

April 21, 1997

Appellant or Petitioner:
[X] Plaintiff [ ] Defendant

Appellee or Respondent:
[ ] Plaintiff [ ] Defendant

ORDER

(Filed May 6, 1997)

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is denied

/s/ Ellsworth A. Van Graafeiland
per DGJ

/s/ Dennis Jacobs

5/6/97 /s/ Guido Calabresi per DGJ

Date Circuit Judge

Previous requests for similar relief and disposition: The Tolands moved before the court below (Hon. Milton Pollack) for the relief sought here, which Judge Pollack denied.

Statement of the issue(s) presented by this motion: Whether this Court will stay the order of Judge Pollack below, to the extent that it instructs the Tolands to dismiss a pending arbitration with prejudice, during the pendency of the review of the Tolands' case by the United States Supreme Court, with which the Tolands have filed a petition for writ of certiorari. Alternatively, whether this Court will recall its mandate pursuant to Local Rule 27(c) and stay the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

Brief statement of the facts (*with page references to the moving papers*): The Tolands were in arbitration against appellee Prudential Securities, Inc., when Judge Pollack entered a final order and judgment enjoining the Tolands from further prosecuting the arbitration. Affidavit, para. 2. They moved before Judge Pollack for relief from his final order and judgment, which he denied. Id. They appealed to this Court. Id. During the pendency of the appeal, Judge Pollack stayed the requirement in his order that the Tolands dismiss their arbitration with prejudice. Id. This Court affirmed Judge Pollack's judgment and issued a mandate. Id., para. 3. The Tolands again, but unsuccessfully, moved before Judge Pollack to stay his order while they sought Supreme Court review by way of a petition for writ of certiorari Id., para. 4. The Tolands have filed that petition, and it is now pending before the Supreme Court. Id.

Summary of the argument (*with page references to the moving papers*): This Court has jurisdiction to grant the Tolands' requested stay under 28 U.S.C. sec. 2101(f), which allows a court rendering a judgment to stay the judgment if it is subject to review by the Supreme Court

on writ of certiorari. Alternatively, this Court may recall its mandate pursuant to Local Rule 27(c) and may stay the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure upon a showing that the petition for writ of certiorari presents a substantial question and that there is good cause for the stay. Memorandum at 1-2.

The stay is warranted because the Tolands' petition for writ of certiorari presents two substantial questions. The first substantial question is whether the Tolands' inclusion in the class definition of the class action below (MDL 1005) violated their due process rights, given that they had already opted out of a previous class action in Louisiana (MDL 888) covering the same investments as those at issue below. The second is whether the Tolands' due process rights were violated by the class notice provisions of MDL 1005, which the Tolands contend did not amount to the best notice practicable under the circumstances. Id. at 2-3.

The stay is also warranted because the Tolands have shown good cause. Judge Pollack's order requires them to dismiss their arbitration with prejudice, but a Supreme Court reversal would allow the Tolands to resume their arbitration. A dismissal, therefore, would be premature and prejudicial to the Tolands. They should be allowed to exhaust the Appellate process before dismissing their arbitration. Id. at 3.

CAHILL GORDON & REINDEL
Eighty Pine Street
New York, N.Y. 10005-1702

(Letterhead Omitted In Printing)

May 9, 1997

Re: Toland v. Prudential
AAA # 71 13600185 93

Dear Mr. Chamberlin:

We are in receipt of your letters of April 28 and May 5 to Kimberly L. Emerson, Supervisor of Commercial Case Management with reference to the above matter.

For good order's sake, we wish to record that Prudential Securities Incorporated has not acquiesced in, excused or in any way ratified your clients' apparently willful failure and refusal to abide by the Order of the United States District Court for the Southern District of New York directing them to dismiss the referenced arbitration.

The District Court had jurisdiction over your clients and the subject matter of its injunction. You appealed the Order and lost. You thereafter asked Judge Pollack to stay the effectiveness of his Order and your motion was denied. In order [sic] words, you have no legal justification to delay compliance with the Court's Order.

In these circumstances, the request in your letter of April 28, 1997 that Ms. Emerson "not dismiss the case at this time" can only be viewed as a direct act of disobedience of the District Court's injunction. Any adverse consequences resulting therefrom will have been self inflicted.

Sincerely,

/s/ Mathias E. Mone
Mathias E. Mone

Neil Chamberlin, Esq.
Duncan & Rainwater
Three Financial Centre
Suite 500
900 S. Shackleford
Little Rock, AR 7221[sic]-3850

cc: Mahlon M. Frankhauser, Esq.
Ms. Kimberly L. Emerson

Duncan & Rainwater
A Professional Association of
TRIAL LAWYERS

PHILLIP J. DUNCAN, P.A.
MICHAEL R. RAINWATER, P.A.
ROBERT A. RUSSELL, JR.
AMELIA MOSLEY RUBBELL
NEIL R. CHAMBERLIN
MICHELLE BANKS ODUM
J. STEPHEN HOLT

May 13, 1997

BY FACSIMILE: (972) 490-9008

Kimberly L. Emerson
Supervisor of Commercial Case Management
American Arbitration Association
1750 Two Galleria Tower
13455 Noel Rd.
Dallas, TX 75240-6636

Re: Toland v. Prudential
AAA #71 136 00185 93

Dear Ms. Emerson:

Today, we received an order from the United States Court of Appeals for the Second Circuit, in which the Court denies the Tolands' motion to stay the order of the United States District Court for the Southern District of New York requiring the Tolands to dismiss their arbitration. Based on the orders of the above two Courts, the Tolands dismiss the above-referenced arbitration. The Tolands' petition for writ of certiorari remains pending with the United States Supreme Court. If there is reason to revisit this issue after the Supreme Court rules on the petition, we will contact you at that time.

Sincerely,

/s/ Neil Chamberlin
Neil Chamberlin

cc: Mahlon M. Frankhauser, Esq. (By Facsimile: (202) 778-9100)
Matthias E. Mone, Esq. (By Facsimile: (212) 269-5420)